

34710-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALEXANDER JOHNSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Was the defendant's right to a fair and impartial jury violated if Juror number 2 did not express any bias or any preconceived ideas toward either party during jury selection?

2. Was the defense attorney ineffective for failing to challenge Juror number 2 if there was not a basis in which to do so?

3. Did the trial court allow the defendant the opportunity to explain his absence from the trial before he was sentenced?

4. If the defendant was charged with bail jumping before sentencing on the present convictions, and he pleaded guilty to bail jumping after sentencing, based upon his knowing and voluntary absence from trial on the current convictions, did the trial court err by not specifically inquiring of the defendant the reason he absented himself from the proceedings which potentially could have caused the defendant to incriminate himself?

5. If there was error when the trial court did not specifically ask the defendant for an explanation about his absence from the trial before the sentence was imposed, was it harmless?

6. Was the defense attorney ineffective by not objecting to the detective's testimony regarding the pellet gun manufacture's warning regarding the weapon if his defense was one of general denial and if he used the warning to bolster his argument that the pellet gun could not be

considered a deadly weapon at the distance in which it was discharged in this case?

7. Did two State fact lay witnesses express inadmissible and improper opinions regarding the defendant's guilt when they testified that the defendant was the shooter, if that testimony was based upon the witness's personal observations and contacts with the defendant and reasonable inferences from those observations as to the identity of the shooter?

8. Did the trial court abuse its discretion when it overruled an objection regarding the defendant's tenancy status at the apartment building in which he was residing, if the evidence was necessary to establish certain witnesses' familiarity with the defendant and the foundation for the witness's identification of the defendant in a surveillance photo?

9. Was the defense attorney ineffective by not objecting to testimony of the defendant's tenancy status if the defendant has not established that his tenancy status at the apartment building was "propensity" evidence under ER 404(b)?

II. STATEMENT OF THE CASE

1. Procedural history.

Alexander Johnson was charged by second amended information in the Spokane County Superior Court with felony harassment, second degree

assault, malicious harassment, and third degree malicious mischief (a gross misdemeanor). CP 13-14. The matter proceeded to trial and Mr. Johnson was convicted as charged on June 23, 2016. CP 78-81.

2. Substantive facts.

Melanie Kurtzhall was a property manager for the Cornerstone Courtyard (hereinafter “complex”) located at 173 South Adams in Spokane. RP 248.¹ Ms. Kurtzhall was familiar with the defendant, Mr. Johnson, as he was an unauthorized guest and boyfriend of a tenant, Noel Beck, who leased apartment 319 at the complex. RP 251. Ms. Kurtzhall explained that a person was “unauthorized” if he or she resided in an apartment for more than three days without applying to be added to the lease. RP 251. If a person did not apply for approval, he or she had 14 days to stay in a particular apartment. RP 251.²

Prior to the incident, Ms. Kurtzhall asked Ms. Beck to comply with the terms of the lease so that Mr. Johnson could properly reside with her. RP 252. Ultimately, the paperwork and application were filed with the Spokane Housing Authority to add Mr. Johnson to the lease and the application was denied. RP 252.

¹ An individual needed a key to gain access to the building and it had surveillance cameras placed inside and outside of the building. RP 252.

² These particular rental conditions were required by the Spokane Housing Authority, who leased the property. RP 248, 251.

At the time of and prior to the events below described, victim Eric Leggett lived in the Pearl apartment building which adjoins the complex. RP 339. For a period of time, Mr. Leggett and Mr. Johnson had friendly conversations outside of the apartment buildings during smoke breaks. RP 340-42. At one point, Mr. Leggett told Mr. Johnson he was openly gay. RP 340-43.

March 2015 incident.

On March 21, 2015, Mr. Leggett approached Ms. Kurtzhall and informed her that someone had placed several unsavory notes on the outside of his apartment window at the complex. RP 254, 345. Mr. Leggett spoke quickly and appeared very scared. RP 257.

Thereafter, Ms. Kurtzhall reviewed the apartment's outdoor surveillance tape and observed the defendant walk back and forth, placing something on an outside apartment window. RP 255; 259. Ms. Kurtzhall subsequently read the notes placed on Mr. Leggett's window and believed the notes were threatening in nature. RP 257. An officer responded to the complex several days later to investigate and took possession of the four notes. RP 258, 272-73. The officer read the notes into the record at trial.

The first note read: "Wish for a quick death to," "Eric." RP 276. The second note stated: "To," "Eric, don't fuck with us." The third note said: "To," "Eric," "we will take the man on the couch and your fag friends too."

RP 279. The fourth and final note declared: “To Eric,” “Eric, do not --” “disrespect anyone,” “with your comments.” “You will be hurt and kept alive.” RP 280.³ When the officer spoke with Mr. Leggett, he appeared very fearful. RP 283. Later on, a fingerprint specialist identified a latent finger print on the third note as belonging to Mr. Johnson. RP 331. Mr. Leggett felt threatened by the notes, believing his life was in danger. RP 346.

April 2015 incident.

Following the March incident, on April 12, 2015, during the later evening hours, Angel Willson⁴ observed Mr. Johnson with a black rifle. RP 290, 293. During this same time period on April 12, 2015, something was hitting Mr. Leggett’s outside apartment window. RP 349. Mr. Leggett walked outside and checked the alleyway, not observing anyone near his window. RP 350. When he returned to his apartment, the tapping noise continued on the window. RP 350. Mr. Leggett returned to the street, seeking the source and cause of the window noise. RP 352. He heard a “zing and [] felt the pop of the bullet to [his] skin...” RP 352. Mr. Leggett believed his life was in jeopardy. RP 354-55.

³ The officer remarked the words “not” and “disrespect anyone” were triple underlined. RP 279.

⁴ Ms. Willson was a caseworker for some of the tenants at the complex. RP 287.

The next morning, at around 8:00 a.m., Mr. Leggett informed Ms. Kurtzhall someone had shot him. RP 259-60. Ms. Kurtzhall again reviewed the surveillance tape and observed Mr. Johnson with “a rifle-looking gun,” pacing back and forth, looking out the window of his apartment. RP 261, 496. Again, police were summoned to the complex. RP 261, 301. Officer Joshua Laiva spoke with Mr. Leggett, who appeared anxious and scared. RP 301-02. Mr. Leggett had a bright red welt near his right armpit and a corresponding hole in his shirt. RP 302-03. Mr. Leggett believed Mr. Johnson was responsible and told officers about Mr. Johnson. RP 357. However, he did not see the shooter. RP 363.

At the time of the incident, the defendant had been living with Ms. Beck. RP 310. Officer Laiva spoke with Ms. Beck and was allowed entry into her apartment to view the outside windows. RP 310-11. One of the windows was opened approximately one inch and was wide enough to fit the barrel of a rifle. RP 311. The officer observed a direct, downward trajectory from Ms. Beck’s window to Mr. Leggett’s apartment window and the officer also spotted damage to Mr. Leggett’s screen and window to his apartment, including a hole in the apartment window and broken glass. RP 312-15, 317

After the event, Mr. Johnson told a neighbor, Jack Swanstrom, that he thought Mr. Leggett was hitting on him and it bothered him. RP 372.

During the evening of the April 12 incident, Mr. Swanstrom observed Mr. Johnson exiting an apartment at the complex with a rifle. RP 369.

Detective Randy Lesser looked at Mr. Leggett's outside window after the incident. RP 380. It appeared that a projectile penetrated the screen of the window and subsequently struck the glass in the window, which caused part of the glass to break. RP 380. In addition, there was additional damage in the form of indentations around the glass and on the metal frame of the window. RP 380.

The detective spoke with Mr. Johnson several days after the April incident.⁵ RP 389. Mr. Johnson acknowledged he owned a pellet gun, but denied shooting Mr. Leggett. RP 389-90. The pellet gun was collected by detectives and was shown to the jury at the time of trial. RP 393-95. Mr. Johnson acknowledged he had numerous issues with Mr. Leggett and admitted he left the notes on Mr. Leggett's apartment window. RP 391-92. Mr. Johnson told the detective he was aware Mr. Leggett was gay. RP 392.

The detective also reviewed the surveillance video of the complex regarding the April incident and the time/date stamp associated with that

⁵ The trial court conducted a CrR 3.5 hearing before trial. RP 168-88. Ultimately, the court determined the statements made by Mr. Johnson to the detective would be admissible at the time of trial. RP 188-95.

video. Mr. Johnson was observed walking around the complex with a pellet rifle approximately 14 minutes before Mr. Leggett was shot. RP 425-26.

III. ARGUMENT

A. MR. JOHNSON FAILS TO ESTABLISH ANY BIAS REGARDING JUROR NUMBER 2, AND HE HAS FAILED TO ESTABLISH HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THIS JUROR FOR CAUSE.

Mr. Johnson first asserts that Juror number 2 was actually biased against him. Appellant Br. at 11-20. This claim is based upon the following passage taken from voir dire:

[DEPUTY PROSECUTOR]: One of the things that [the defense attorney] talked about was having evidence to prove something and believing in something. And I can't remember whether it was juror No. 5 -- sorry, you would think I could remember ten minutes ago, but if -- and I'll ask Juror number 2. If I present evidence to you to prove a proposition and the evidence does prove that proposition, can you believe that?

JUROR NUMBER 2: Yes. I have faith that you are giving us the truth and that the evidence that you're giving us is reliable, that the evidence that this party would give is reliable, so I would say if evidence is presented in court, I would believe it.

RP 123-24.

The Sixth and Fourteenth Amendments and article I, section 22 of the Washington Constitution guarantee a defendant the right to a fair trial before an impartial jury. Const. art I, § 22; *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 30, 296 P.3d 872 (2013). The right to trial by jury means a

trial by an unbiased and unprejudiced jury. *State v. Stackhouse*, 90 Wn. App. 344, 350, 957 P.2d 218 (1998); *review denied*, 136 Wn.2d 1030 (2001).

A challenge of a juror for cause based on actual bias “must be established by proof ... and the proof must indicate that the challenged juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” *Brady v. Fibreboard Corp.*, 71 Wn. App. 280, 283, 857 P.2d 1094 (1993) (citing RCW 4.44.170(2); RCW 4.44.190). The fact that a juror may have formed an opinion on the matter is not enough for a challenge for cause based on actual bias. *Id.* (citing RCW 4.44.190). “[T]he question is whether a juror with preconceived ideas can set them aside.” *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). A defendant must prove actual bias by showing more than a mere possibility that the juror was prejudiced. *See Id.* at 840; *Stackhouse*, 90 Wn. App. at 350.

A juror should not be disqualified merely because the juror harbors opinions that may affect the determination of the issues. *State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210 (1987). Instead, the appropriate question is “whether a juror with preconceived ideas can set them aside” and decide the case impartially based on the law and the evidence at trial. *Noltie*, 116 Wn.2d at 839.

The trial judge is best situated to determine a juror's competency to serve impartially. The trial judge is able to observe the juror's demeanor and, in light of that observation, to interpret and evaluate the juror's answers to determine whether the juror would be fair and impartial.

Rupe, 108 Wn.2d at 749 (internal citations omitted).

1. The defendant has not established *any* actual bias regarding Juror number 2.

In the present case, it is unclear on what factual basis the defendant bases his claim. Juror number 2 expressed *no* indication that she could not be fair or that she had any preconceived ideas on the merits of the case, how it should be decided, or that she favored one side over the other. The juror remarked that she had “faith that you [the deputy prosecutor] are giving us the truth and that the evidence that you’re giving us is reliable, *that the evidence that this party [the defendant] would give is reliable*, so I would say *if evidence is presented in court, I would believe it.*” RP 124 (emphasis added). Although possibly inarticulate, the juror acknowledged she could be objective to both sides when evaluating the evidence. With this bare remark, the defense has not met his burden of proof to establish actual bias.

The defendant faults Juror number 2 for “[expressing] no awareness or understanding of her duty as a juror to be an independent judge of the weight of the evidence and the credibility of the testimony presented[.]” Appellant Br. at 20. However, the jurors had not been

instructed on the law at this point in the proceedings and there is no indication that once the court instructed the jury on the applicable law, including evaluating the evidence, that Juror number 2 did not follow the court's instructions. *See* RP 506-08; CP 45-47 (evaluation of the evidence and credibility of the witnesses). Indeed, it is presumed that juries follow the court's instructions, absent evidence to the contrary. *State v. Arredondo*, 188 Wn.2d 244, 264, 394 P.3d 348 (2017). Mr. Johnson provides no evidence to the contrary.

Mr. Johnson's reliance on *State v. Irby*, 187 Wn. App. 183, 347 P.3d 1103 (2015), *review denied*, 184 Wn.2d 1036 (2016), is of no avail as it is factually distinguished from the present case. In *Irby*, a prospective juror explained that she may not be able to give the parties a fair trial because "I'm more inclined towards the prosecution I guess." *Id.* at 190. When the court asked if that would impact her ability to be fair and impartial and whether she could listen to both sides, the juror responded "I would like to say he's guilty." *Id.* There was no follow up to this exchange, and the juror was seated on the jury. *Id.*

Division One of this court stated that the juror's answer that she "would like to say he's guilty" was akin to an unqualified statement that she did not think she could be fair. *Id.* at 196. In addition, the juror did not give an assurance that she had an open mind on the issue of guilt. *Id.* As a result,

the court concluded that the juror demonstrated actual bias and that seating her on the jury was manifest constitutional error. *Id.* at 197, 347 P.3d 1103.

Likewise, *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), is also dissimilar. In *Gonzales*, a juror stated she was more likely to believe police testimony, repeated it several times, and responded that she did not know if she could presume the defendant innocent. *Id.* at 278-79. Division One reversed, noting that the juror unequivocally admitted a bias regarding the police, believed the bias would affect her deliberations, did not know if she could presume the defendant was innocent in light of the officer's testimony, and she was never rehabilitated. *Id.* at 281.

Mr. Johnson has not established any bias regarding Juror number 2 and there was no error in seating this particular juror.

2. The defense attorney was not ineffective for failing to challenge Juror number 2 for actual bias.

In like manner, the defendant further alleges his trial counsel was ineffective because he did not challenge Juror number 2 for actual bias. Appellant Br. at 17-20.

Standard of review.

An appellate court reviews ineffective assistance of counsel claims de novo. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015). The defendant has the burden of establishing ineffective assistance of counsel. *State v. Humphries*, 181 Wn.2d 708, 719-720, 336 P.3d 1121 (2014). To

prevail, a defendant must show that (1) counsel's performance "fell below an objective standard of reasonableness and (2) there was prejudice, measured as a reasonable probability that the result of the proceeding would have been different." *Humphries*, 181 Wn.2d at 720; *see Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In that regard, there is a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This presumption will be rebutted only by a clear showing of incompetence. *State v. Varga*, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). The defendant bears the burden of showing there were no conceivable legitimate strategic or tactical reasons explaining counsel's performance. *McFarland*, 127 Wn.2d at 336. If trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

To establish ineffective assistance of counsel based on defense counsel's performance during voir dire, a defendant generally must demonstrate the absence of a legitimate strategic or tactical reason for counsel's performance. *State v. Johnston*, 143 Wn. App. 1, 17, 177 P.3d 1127 (2007); *see also State v. Alires*, 92 Wn. App. 931, 939, 966 P.2d 935 (1998). It can be a legitimate trial strategy not to pursue

certain areas during voir dire to avoid antagonizing a potential juror. *Johnston*, 143 Wn. App. at 17.

Here, there is no evidence of any bias, let alone actual bias, with regard to Juror number 2. There would have been no basis for a challenge for cause as the juror neither admitted nor implied any bias nor did she reveal any preconceived ideas against the defendant. Mr. Johnson fails to establish his ineffective assistance of counsel claim because there is no evidence in the record that Juror number 2 would have been excused had she been challenged.

B. IT WAS REASONABLE FOR THE TRIAL COURT NOT TO SPECIFICALLY INQUIRE INTO THE DEFENDANT'S ABSENCE BEFORE SENTENCING. SUCH INQUIRY COULD HAVE REQUIRED THE DEFENDANT TO INCRIMINATE HIMSELF. MOREOVER, THE DEFENDANT DECLINED TO COMMENT REGARDING HIS ABSENCE DURING HIS ALLOCUTION. FINALLY, THE DEFENDANT PLEADED GUILTY TO BAIL JUMPING AFTER SENTENCING FOR HIS KNOWING AND VOLUNTARY ABSENCE FROM TRIAL.

Mr. Johnson next alleges the trial court violated his right to be present when he absented himself from the proceedings after voir dire because the court did not specifically inquire whether his absence was voluntary before sentencing. *See* Appellant Br. at 20-27.

At the commencement of trial on the morning of June 20, 2016, Mr. Johnson was present in court with his lawyer, Dennis Dressler. RP 10.

After a jury was selected and the court addressed several motions, the court took a morning recess.⁶ RP 27-189, 199-212, 219.

The court reconvened, but the defendant had left the courtroom. During the recess, several police officers looked for Mr. Johnson in the courthouse and searched part of the county campus. RP 220. The defense attorney also looked in the nearby restroom and attempted phone calls to the defendant, using Mr. Johnson's two most recent contact numbers, to no avail. RP 221.

Thereafter, the trial court made a record stating that Mr. Johnson had disappeared from the trial. RP 222.

Mr. Dressler, who I respect greatly, he knows that, went looking for his client to no avail. I know Mr. Dressler also has indicated he tried to call several phone numbers that he has that have been made available to him by his client and his client's wife, who was here this morning, who I talked to at great length and, in fact, specifically asked her to give us her phone number this morning. So it's not a dated phone number. It was a number that was given to us an hour or so ago so should be a valid number.

RP 222.

⁶ Jury selection marks the start of trial for purposes of determining whether a defendant's absence from it is voluntary. *State v. Thomson*, 70 Wn. App. 200, 210-11, 852 P.2d 1104 (1983), *affirmed*, 123 Wn.2d 877 (1994).

The trial court then reviewed the provisions of CrR 3.4⁷ and relevant case law on the record and its implication in this case, and authorized a bench warrant for Mr. Johnson's arrest. RP 227-31. Before taking a recess until after the lunch hour to allow Mr. Johnson to return, the court commented:

His absence does appear to be voluntary on the face but I suppose there could be an explanation that we're otherwise unaware of. I'll give him the benefit of the doubt but if he's not here at 1:30 and we haven't otherwise located him in an emergency setting -- I guess in all fairness...

So this is inconvenient to me, to the lawyers, it's inconvenient to the detective, witnesses who have been patiently waiting. More so it's inconvenient to our jurors but I don't want to have to try this case again. We don't need to declare a mistrial, which is my first concern.

...

So again, Counsel, I apologize for the inconvenience, but I guess in fairness it's not my fault. It's not your fault, and Mr. Dressler, just so we have a clear record, yes, I heard the gentleman make a statement this morning as I was in the middle of his arraignment about something to the effect that he thought the jurors were already biased against him, which would be somewhat nonsensical under the circumstances. But that having been said, I would be surprised if we locate him in an emergency room or someplace else. I think he's just trying to avoid being here for whatever reason, which is

⁷ CrR 3.4 states, in pertinent part:

(b) Effect of Voluntary Absence. The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict...

sad because he's going to end up I would imagine facing other charges as a result of this if he doesn't appear, but that's beside the point. If he shows up, and if he doesn't, we'll go forward without him at 1:30.

RP 227-31.

After the lunch hour, the trial court and counsel reconvened without the defendant, and the court made further remarks:

... Mr. Johnson, is not just late or delayed and whether he's truly just not coming back, and we'd been waiting since thereabouts 10:00 this morning. It is now about 20 minutes to the hour, 20 minutes to 2:00 in the afternoon. Seems pretty clear to me Mr. Johnson isn't going to return and during our recess we checked the local hospitals. Might seem like an exercise in silliness but just to be sure that Mr. Johnson wasn't there, and we also checked our jail roster in case in some fashion he happened to get picked up. No sign of Mr. Johnson anywhere.

We also checked our clerk's office to see if for some reason he might be there. There is no sign of him and I'm satisfied that I've laid down enough of a record, as has counsel, and foundation for us to go forward with the trial without Mr. Johnson here. I will read the instruction that counsel have agreed upon to the jurors as we referenced as soon as the jurors are out here in court and they're settled in.

RP 236-38.

On June 22, 2015, toward the close of the State's case-in-chief, the trial court made the following record outside the presence of the jury, after a short discussion with counsel regarding Mr. Johnson's status:

[THE COURT]: They apparently have surrounded or near a home or at the home where Mr. Johnson is believed to be residing at at [sic] this point in time and they are attempting

to either get him to come out voluntarily or make entry, one of the two.

RP 428.

In the interim, Mr. Johnson was arrested on the court's warrant.

RP 453. The court resumed after the lunch break at 1:30 p.m., on June 22, 2015, and made a further a record regarding the defendant's absence.

[THE COURT]: It's about 20 minutes to 2:00 and it's the 22nd of June, 2016, and we talked before the break about potential for Mr. Johnson to join us again since he's been absent from the trial after we recessed after the jury was selected and he didn't come back but now I understand Mr. Johnson is in custody. He is actually physically down here on the County property. He is not, as the jail staff just advised me, he is not portable in terms of his appearance, so I guess I just wanted to, Counsel, run it by all of you about procedurally that, to be quite frank, I've never had a situation like this develop yet. I'm not sure if we should go forward right now. I mean I've got jurors waiting or whether we stop and get him over here and he – if he wants to be in the courtroom. I can't have him in the courtroom looking the way I understand he looks based on what the jail has told me.

[DEPUTY PROSECUTOR]: How does he look?

[THE COURT]: He looks like he's been in a scuffle. Let me put it that way, that's what I understand. His pants are torn up. He's got jail slippers. But then again, the concern I have is what I was just telling Ms. Dorman, arguably he's already indicated his intentions to not be here. Maybe I need to get him over here for him to formally tell us on the record what he would like to do one way or another. If he doesn't want to be here for the rest of the trial, maybe he can waive that appearance on the record.

RP 437-438.

After a short discussion on the record, Mr. Johnson was transported to the courtroom.

[THE COURT]: Mr. Dressler, so we have a change in circumstances in that your client has joined us so do you want to give me a courtesy heads up? What's the status of Mr. Johnson to remain with us during trial?

[DEFENSE ATTORNEY]: Thank you, your Honor. Please the Court and Counsel. I discussed with Mr. Johnson his right to remain, which is pretty much a given for everybody. I also discussed with him the case law that says as long as it's knowing and intelligent he can make a waiver of attending. We discussed that. We discussed issues surrounding that.

Mr. Johnson would like to remain...

[THE COURT]: Excellent.

[DEFENSE ATTORNEY]: I also had the conversation with Mr. Johnson that the Court had made reference to that remaining obviously now having a stern conversation with the Court was dependent upon respectful participation and Mr. Johnson understands that or has assured me that he does. So at this point, Judge, I think the one instruction we had dealing with his absence will probably need to come out of the packet because he's back.

...

[THE COURT]: Okay. Thanks. Let me chat with Mr. Johnson first. By the way, do you have any blank release conditions? Looks like you do.

Mr. Johnson, good afternoon.

[THE DEFENDANT]: Good afternoon.

[THE COURT]: Sir, I just wanted to verify you had a chance to speak with Mr. Dressler, correct?

[THE DEFENDANT]: Yes, sir.

[THE COURT]: And have you made a decision, sir, that you would like to remain in the courtroom for the balance of the trial?

[THE DEFENDANT]: Yes, sir.

[THE COURT]: Okay. And you feel that's a decision you made after being fully advised by Mr. Dressler regarding your rights? To remain in the trial?

[THE DEFENDANT]: Yes.

[THE COURT]: Okay. And, sir, you do understand that Mr. Dressler explained to you, you do have a right not to be present at trial if you want, as long as you make a knowing and voluntary waiver of that. But so I'm clear, sir, your determination is you would like to stay, you would like to participate in the trial and be here, correct?

[THE DEFENDANT]: Correct.

[THE COURT]: Okay. And, sir, I don't make this comment out of any disrespect to you, so please don't assume that, but I have a responsibility to make sure as best I can that the State gets a fair trial and that you get a fair trial, sir, and I don't know what the issues or lack of issues might be with you and Mr. Dressler. I don't know if you have any kind of difficulty or not working with him. But I wanted your word, sir, that you're going to -- not that you acted out before, that's not what I'm saying. But I want your word that you're going to behave in trial and that you're going to be respectful.

The reason I say that to you, sir, is because if you misbehave, if you act disrespectful, if you do guffaws and make faces and things like that, it doesn't benefit you at all in front of

jurors who will circle in on you and your behavior. So as long as you're willing to sit here and be respectful, you're going to get all the respect from you deserve. Clear?

[THE DEFENDANT]: Very.

RP 443-47.

Standard of review.

An appellate court reviews the trial court's decision to proceed with trial in the defendant's absence for abuse of discretion. *State v. Garza*, 150 Wn.2d 360, 366, 77 P.3d 347 (2003). Abuse of discretion means "no reasonable judge would have ruled as the trial court did." *State v. Mason*, 160 Wn.2d 910, 934, 162 P.3d 396 (2007) Stated differently, whether the trial court's decision was based on untenable reasons or grounds. *State v. Woods*, 143 Wn.2d 561, 626, 23 P.3d 1046 (2001).

To determine whether a defendant voluntarily left the trial, the trial court, under a totality of the circumstances standard, follows a three-step process: it must (1) inquire sufficiently into the circumstances of the defendant's disappearance to justify a finding of voluntary absence, (2) make a preliminary finding of voluntariness if the circumstances in step one are established, and (3) *provide the defendant an opportunity to explain his or her absence before the trial court imposes a sentence.* *State v. Thomson*, 123 Wn.2d 877, 881, 872 P.2d 1097 (1994).

With respect to the third factor, our Supreme Court has held its procedure:

[p]rovides an opportunity for the defendant to explain his or her disappearance and *rebut* the finding of voluntary absence before the proceedings have been completed. Thus, we hold that the trial court is not required to start its analysis anew in the third prong of the *Thomson* analysis.

State v. Thurlby, 184 Wn.2d 618, 630, 359 P.3d 793 (2015) (emphasis in the original) (citation omitted).

1. Trial court's probe into the circumstances of Mr. Johnson's absence and the preliminary finding of voluntariness.

Here, it is uncontroverted that Mr. Johnson left the trial after a jury was selected during the morning of June 20, 2016. Mr. Johnson's lawyer attempted to call him using Mr. Johnson's two most recent telephone contact numbers. The court's staff contacted local hospitals, the clerk's office, and checked the jail roster; there was no medical emergency. The court waited approximately three hours and considered all of the circumstances, until it determined Mr. Johnson's absence was voluntary. Mr. Johnson had no contact with his lawyer or the court until he was arrested and brought into the courtroom, by jail staff, after his arrest on the bench warrant on June 22, 2016. The defense attorney discussed Mr. Johnson's options with him of either staying in the courtroom for the remainder of trial or returning to jail pending a verdict. Upon the defendant's return to the courtroom, the court instructed Mr. Johnson he must maintain decorum if

he wished to remain in the courtroom. Mr. Johnson advised the court he wanted to remain in the courtroom.

2. The trial court provided Mr. Johnson with an opportunity to explain his absence.

Mr. Johnson was sentenced on August 25, 2016. CP 86-98, CP 100-14, RP 571. Prior to sentencing, Mr. Johnson had been charged with bail jumping for his absence from trial. CP 139. During sentencing and before the defendant's allocution, the defense attorney advised the court that the defendant had recently been charged with bail jumping. RP 583. At sentencing, the court allowed the defendant to make a statement:

And Mr. Johnson, as I'm sure [defense counsel] has explained to you, you have an absolute right this morning to make a statement if you would like. It's called allocution, which is the legal way -- legal term that we use to simply say if there's anything that you want to say, it is an absolute right you have to make a statement. But I tell everybody, as I'm telling you right now, sir, you're not required to say a word and if you choose not to, in no way do I hold that against you but, of course, if there's anything that you would like to add, I would more than welcome your comments.

RP 585.

Mr. Johnson declined the court's invitation. RP 585. Mr. Johnson did not explain his absence to the court, although given the opportunity to speak. He offered no explanation, presumably under the advice of counsel, to potentially prevent self-incrimination. Moreover, it was reasonable under the circumstance for the court not to specifically inquire of the defendant's

absence as to not compel the defendant to make incriminating statements regarding the bail jumping charge. The totality of the circumstances establishes that Mr. Johnson voluntarily waived his right to be present after jury selection and the trial court did not err when it did not specifically inquire regarding the defendant's absence. The trial court did not abuse its discretion.

3. If there was error in the trial court not specifically inquiring of the defendant regarding his absence, it was harmless beyond a reasonable doubt.

Although the State is not conceding any error regarding the court's specific lack of inquiry of the defendant, if there was error, it was harmless beyond a reasonable doubt.

A violation of a defendant's right to be present during all critical stages of a trial is subject to constitutional harmless error analysis. *State v. Irby*, 170 Wn.2d 874, 885-86, 246 P.3d 796 (2011); *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 921, 952 P.2d 116 (1998) (violation of the right to be present is subject to the harmless error analysis). The State must prove beyond a reasonable doubt that the violation of a defendant's right to be present had no effect on the verdict. *Irby*, 170 Wn.2d. at 886-87.

As stated above, Mr. Johnson had been charged with bail jumping⁸ on August 8, 2016, for knowingly failing to appear for his trial on or about June 21, 2016.⁹ CP 139 (information), 140-43 (probable cause affidavit). Mr. Johnson subsequently pleaded guilty to that charge on November 17, 2016, which required that he admit the elements of the crime; namely: that he knowingly absented himself from the trial proceedings on June 21, 2016, and failed to return to the court as required. CP 144-55 (judgment and sentence), CP 156-66 (statement on plea of guilty). Under the totality of the circumstances, the defendant's absence from trial was knowing and voluntary, even absent a specific inquiry from the judge.

Additionally, the defendant was present before the end of the State's presentation of evidence, was able to discuss the evidence with his attorney,

⁸ The elements of bail jumping, as defined in RCW 9A.76.170, are: (1) the defendant was charged with a particular crime, (2) he was released by court order or admitted to bail, (3) *he had knowledge that a subsequent appearance was required*, and (4) that *he failed to appear as required*. It is an affirmative defense to the charge that uncontrollable circumstances prevented an individual from appearing in court, the person did not contribute to his or her own absence from court, and the person appeared as soon as the circumstances permitted. RCW 9A.76.170(2). Mr. Johnson did not aver such a claim before pleading guilty to the charge or before being sentenced on the current charges.

⁹ After the State's motion to add documents, a Commissioner of this Court granted the motion to add the probable cause affidavit, the information, statement on plea of guilty, and the judgment and sentence regarding the plea of guilty to the bail jumping offense under the Superior Court cause number 16103053-1 for purposes of this appeal.

and had the opportunity to testify and present witnesses if he so decided. If there was a constitutional violation, it was harmless beyond a reasonable doubt.

C. THE DEFENDANT HAS FAILED TO ESTABLISH HIS LAWYER WAS INEFFECTIVE FOR NOT OBJECTING TO THE DETECTIVE'S TESTIMONY REGARDING THE PELLET GUN MANUFACTURER'S WARNING REGARDING THE WEAPON.

Mr. Johnson next alleges his defense lawyer was ineffective for failing to challenge alleged hearsay regarding the pellet gun that was used to assault Mr. Leggett. Appellant Br. at 27-35.

At the time of trial, the detective testified to the following regarding the pellet gun, stating:

What I did when I researched it is I pulled up the owner's manual for this weapon. The first warning right immediately on the owner's manual states: "Warning: Not a toy. This air gun is recommended for adult use only. Misuse or careless use may cause serious injury or death. May be dangerous up to 600 yards."

The second warning right below that states: "Do not brandish or display this air gun in public. It may confuse people and may be a crime. Police and others may think it is a firearm. Do not change the coloration and markings to make it look more like a firearm. That is dangerous and may be a crime."

[DEPUTY PROSECUTOR]: Now, as also as part of your research in there, does Cros[s]man provide specifications as to the feet per second of a pellet that's fired from this weapon?

It does, depending on the type of pellet you're firing. If you're firing a lead pellet, the velocity is up to 1,000 feet per second. If you're firing an alloy pellet, the velocity is up to 1200 feet per second.

This is not -- this is not a toy. In fact, when you look at the specific uses listed for suggested activities of the weapon, this is not a toy. The documentation indicates that the suggested activities for utilizing this weapon are for predator hunting and varmint hunting.

RP 396-98.

1. The defense attorney was not deficient because his decision to not object to the above testimony was tactical in that he used the warning to argue the pellet gun could not be considered a deadly weapon under the circumstances and his defense was one of general denial.

Trial strategy and tactics cannot form the basis of a finding of deficient performance. *Johnston*, 143 Wn. App. at 16. The decision of when or whether to object is a classic example of trial tactics. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *Id.*

Here, the defense theory of the case was lack of proof of the identity of the shooter. Accordingly, defense counsel argued the case, as he had questioned the witnesses, on the theory that no one saw anyone shoot Mr. Leggett. Defense counsel's lack of objection to the detective's testimony was tactical for several reasons. First, counsel referred to the

manufacturer's warning label during cross-examination in attempt to establish the police investigation was incomplete as to whether the discharged pellets later collected by Mr. Leggett could be traced to a particular weapon establishing ownership. RP 499. Second, counsel argued from the manufacturer's warning that pellets could not be considered deadly. RP 540-41. Finally, he further argued from the manufacturer's warning that there was no evidence as to under what circumstances this particular weapon could be deadly. RP 541.

As stated by defense counsel during closing argument:

The State talked about the weapon as a firearm. It does fire a projectile. The State talked about the foot-per second velocity of whether it's a lead pellet or an alloy pellet. We know that where the window was shot there are some of what Mr. Leggett believes were the pellet but the detective says, you know, he can't tell. Was it lead at 1,000 feet per second or an alloy at 1200 feet for second, and really that's not the issue because –

RP 540

The State also talked to you about that the weapon may be dangerous up to 600 yards. The distance here is shorter than 600. I don't think anybody would argue that. The quote she had was that "it may be dangerous up to 600 yards." Not deadly, may be. At one point it can possibly cause death under the circumstances in which it is used. But it doesn't say what those circumstances were.

I think you have to look at the day that this assault allegedly took place. There are assumptions that the shot came from apartment 319, which is the residence of Ms. Beck and Mr. Johnson. There's no indication at the time that the shot,

and this was testimony, who was in the apartment. The State would have you believe that at the time it was Mr. Johnson. But there's no testimony to that. We know it wasn't Ms. Beck because she was down by the railroad trestle. I'm not about to suggest it might have been the children that were at home, but there's no testimony as to who else could have been in there and certainly no testimony that at the time, it -
- Mr. Johnson was there.

RP 541.

The decision not to object to the manufacturer's warning was tactical and defendant's ineffective assistance assertion fails under the first prong necessary to establish an ineffective assistance of counsel claim.

2. The defendant has not established he was prejudiced by his lawyer's failure to object to the manufacturer's warning.

There is a strong presumption that counsel's representation was reasonable, and judicial review of a lawyer's performance is highly deferential. *Strickland*, 466 U.S. at 689. As stated earlier, performance is not deficient if counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Kylo*, 166 Wn.2d 856, 862-63, 215 P.3d 177 (2009).

The defendant must affirmatively prove prejudice to establish ineffective assistance of counsel and show more than a "conceivable effect on the outcome" to prevail. *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). Prejudice exists if there is a reasonable probability that "but for counsel's deficient performance, the outcome of the

proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862; *Strickland*, 466 U.S. at 694. It is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

Mr. Johnson fails to establish that he was prejudiced by defense counsel’s failure to object and has not demonstrated a reasonable probability that the result of the trial would have been different if the evidence had not been admitted. There was no argument made or any evidence presented that Mr. Johnson did not appreciate the risk of danger of shooting someone in the eye or other body part with a pellet gun. How a warning that reiterates common sense was somehow prejudicial to the defense in this case is unclear. The defense did not contend that the defendant was too imprudent to appreciate the danger of shooting a hard pellet at the body of another person and the potential for serious injury.

Similarly, admitting the manufacturer’s warning about the weapon did not prejudice the defendant’s case of general denial. Moreover, other evidence established that the pellets had enough force and velocity to penetrate and cause the apartment window to break, with minor damage to the material surrounding the window, and to produce a contusion on Mr. Leggett’s shoulder. The jury certainly could have reasonably concluded, even without the manufacturer’s warning that shooting the pellet gun at Mr. Leggett could have caused substantial bodily injury, especially if one or both of

Mr. Leggett's eyes had been struck.¹⁰ Given these facts, there is no reasonable probability that the jury would have reached a different conclusion in the absence of the admission of the warning label.

Mr. Johnson has failed to show either element of an ineffective assistance of counsel claim. He has not established that his counsel was not engaged in trial strategy, or that he was harmed by the testimony in that it would have changed the outcome of the trial, but for the manufacturer's warning being admitted into evidence. For both of those reasons, his claim fails. There was no error.

D. THE DEFENDANT HAS NOT ESTABLISHED THAT LAY WITNESS TESTIMONY, BASED UPON THE WITNESSES' OWN SENSORY PERCEPTIONS, IDENTIFYING THE DEFENDANT AS THE SHOOTER, CONSTITUTED IMPERMISSIBLE OPINION TESTIMONY. MOREOVER, THE DEFENDANT HAS NOT ESTABLISHED HIS LAWYER WAS INEFFECTIVE FOR FAILING TO OBJECT TO THAT TESTIMONY.

Mr. Johnson next asserts that two fact witnesses expressed inadmissible and improper opinions regarding his guilt in violation of his right to a jury trial. Appellant Br. at 35-39. He further argues his lawyer was ineffective by not objecting to that testimony. Appellant Br. at 39-43. As

¹⁰ Although not a per se deadly weapon, an operative B-B gun can be a deadly weapon, especially if aimed between the eyes. *See State v. Carlson*, 65 Wn. App. 153, 161, 828 P.2d 30 (1992).

discussed below, Mr. Johnson failed to preserve the issue for review and the witnesses' statements were not improper.

1. Alleged improper opinion testimony by lay witnesses.

Witness Kurtzhall.

Mr. Johnson does not identify which testimony from Ms. Kurtzhall he believes constituted improper opinion testimony. However, during redirect of Ms. Kurtzhall, the following exchange took place:

[DEPUTY PROSECUTOR]: When you saw Mr. Johnson with the hand motion as if he was firing a gun at you, what were the thoughts that went through your mind? How did you react to that?

[WITNESS KURTZHALL]: It really frightened me because I knew that he had taken this, whatever, this pellet gun or whatever it was and shot Eric with it so I took it as a direct threat and it just made me scared. So I went back in my office and I actually locked the door.

RP 267.

Witness Leggett.

In addition, Mr. Johnson asserts that Mr. Leggett proffered improper opinion testimony.

[DEPUTY PROSECUTOR]: But do you recall giving a statement to the police?

[WITNESS LEGGETT]: Yes.

[DEPUTY PROSECUTOR]: And at that time, did you indicate to the police who you thought was responsible for your injuries?

[WITNESS LEGGETT]: I did.

[DEPUTY PROSECUTOR]: And who was the person you thought responsible for your injuries?

[WITNESS LEGGETT]: Alex Johnson.

[DEPUTY PROSECUTOR]: Okay. And that's the same Alexander Johnson who you believe put the notes on your window?

[WITNESS LEGGETT]: Yes, ma'am.

[DEPUTY PROSECUTOR]: Okay. Now, is it because of the incident from March 21 that you believed Mr. Johnson to be responsible for the April 12 incident?

[WITNESS LEGGETT]: That and the vantage of the -- of their apartment, yes, to be able to shoot both the window and me in a different perspective. I thought it was very likely and I directed the officers to go that direction with their investigation.

[DEPUTY PROSECUTOR]: Okay. And you were able to walk the officer around the buildings to show them the different windows and the different vantage points, correct?

[WITNESS LEGGETT]: Yes, ma'am.

Standard of review.

There was no objection to the above testimony at the time of trial.

An appellate court reviews for manifest constitutional error if there was not a proper objection in the lower court. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009); *State v. Dent*, 123 Wn.2d 467,

478, 869 P.2d 392 (1994) (failure to object below waives issue unless error is of constitutional magnitude).

A defendant must identify a manifest constitutional error and show that the alleged improper opinion testimony resulted in actual prejudice, which means that it had practical and identifiable consequences in the trial. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

The *Kirkman* court explained that:

[a]ppellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction). Failure to object deprives the trial court of this opportunity to prevent or cure the error. The decision not to object is often tactical. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences.

Id. at 935.

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a manifest constitutional error. *Id.* at 936. Only “an explicit or almost explicit” opinion on the defendant’s guilt or a victim’s credibility can constitute manifest error. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009)

Here, Mr. Johnson has not established the witnesses’ opinions were improper nor has he established actual prejudice as discussed below.

Generally, no witness may offer testimony in the form of an opinion¹¹ regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant because it “invad[es] the exclusive province of the [jury].” *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (alterations in original). A witness expresses opinion testimony when the witness testifies to beliefs or ideas rather than the facts at issue. *Id.* at 760. However, “testimony that ... is based on inferences from the evidence is not improper opinion testimony.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

For instance, in *State v. Hardy*, 76 Wn. App. 188, 884 P.2d 8 (1994), the defendants objected at trial to testimony from an officer who identified the defendant from a grainy videotape as the person who bought drugs from a police informant. *Id.* at 189-190. The defendants contended that the testimony invaded the province of the jury and was improper opinion testimony. *Id.* at 190. Division One noted the lay opinion testimony was proper under ER 701 when it was based on the perception of the witness

¹¹ To determine whether statements are impermissible opinion testimony, an appellate court considers the circumstances of a case, including, “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *King*, 167 Wn.2d at 332-33.

and was helpful to a clear understanding of the issue. *Id.* After review of cases interpreting the federal version of the rule, the court stated:

A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.

Id.

In each case, the officers involved had prior contacts with the defendants and knew them. *Id.* at 191-192. The officers were “in a better position to identify [the defendant] in the somewhat grainy videotape than was the jury.” *Id.* at 191. The court also rejected the claim that the testimony invaded the province of the jury since the jury was free to disbelieve the officers’ identification. *Id.*

In a different context, in *State v. Blake*, 172 Wn. App. 515, 523, 298 P.3d 769 (2012), *review denied*, 177 Wn.2d 1010 (2013), several witnesses identified the defendant as the shooter during a murder. Both witnesses were in the vicinity of a shooting, but did not witness the defendant shoot the firearm. One witness testified:

I didn’t see the person that pulled the trigger. I saw the flash, you understand. It came from my right side. [Blake] was on my right side. I didn’t see the gun. I just saw the flash, and I heard it. Instantly, when I saw the flash and heard the sound,

like I told you, I took off and ran. I was already trying to make my way out of the situation anyway.

Blake, 172 Wn. App. at 524.

The other witness's testimony identified the defendant as the shooter, based on his perceptions of the circumstances surrounding the shooting. *Id.* at 524. In rejecting the defendant's claim that the testimony was an improper opinion regarding his guilt, the court held that because the testimony stemmed from the witnesses' own sensory perceptions and did not contain "conclusory legal terms such as 'guilt' or 'intent,'" the jury was free to disregard the testimony. *Id.* at 525. Ultimately, the court remarked: "Significantly, case law does not support the contention that the challenged testimony included impermissible opinion on guilt, as opposed to allowable testimony as to inferences or fact-based observations." *Id.* at 526.

Likewise, in the present case, the witnesses did not offer an opinion that Mr. Johnson was guilty. Rather, the complained of statements were based upon witness observations and inferences from those observations, as to the identity of the defendant as the shooter and, hence, not improper opinions of guilt. The testimony was relevant because the State had to prove beyond a reasonable doubt the identity of the defendant as the individual who committed the offense. *See Thomson*, 70 Wn. App. at 211. The witnesses' testimony was based solely on their perceptions from the

evidence and their considerable familiarity with Mr. Johnson. Such statements certainly do not rise to the level of an explicit or nearly explicit opinion on the defendant's guilt as is required to constitute a manifest constitutional error.

Assuming *arguendo* that the testimony amounted to an improper opinions of guilt, Mr. Johnson has failed to establish the necessary actual prejudice because the jury was instructed that it was the sole judge of the credibility of witnesses and what weight to place on the testimony. RP 507-08; CP 46.

For instance, in *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), the court found certain opinion testimony clearly improper. There was testimony from several witnesses, including a detective and a chemist, who opined about Montgomery's guilt and specifically testified that Montgomery met the crime's intent element. *Id.* at 587-89. Our high court held that Montgomery failed to establish actual prejudice because the jury was instructed on credibility.

Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed. In *Kirkman*, this court concluded there was no prejudice in large part because, despite the allegedly improper opinion testimony on witness credibility, the jury was properly instructed that jurors "are the sole judges of the credibility of witnesses," and that jurors "are not bound" by expert witness opinions. Virtually identical instructions were given in this case. There was no written

jury inquiry or other evidence that the jury was unfairly influenced, and we should presume the jury followed the court's instructions absent evidence to the contrary.

Montgomery, 163 Wn.2d at 595-96 (internal citations omitted); *see State v. Curtiss*, 161 Wn. App. 673, 697-98, 250 P.3d 496, *review denied*, 172 Wn.2d 1012 (2011) (improper opinion testimony was not reversible error where the trial court properly instructed the jury that it was the sole judge of witness credibility and no evidence indicated the jury was unfairly influenced, thus indicating no unfair prejudice resulted); *State v. Haq*, 166 Wn. App. 221, 266-67, 268 P.3d 997, *review denied*, 174 Wn.2d 1004 (2012) (finding no manifest error where defendant failed to object below, the testimony was not an explicit or nearly explicit opinion on his guilt, and the testimony was not so prejudicial in the context of the entire trial as to create practical or identifiable consequences).

Here, there is no evidence the jury had any questions or were improperly influenced by the testimony. Absent evidence that the jury was unfairly influenced, an appellate court presumes that the jury followed the court's instructions. *Montgomery*, 163 Wn.2d at 596. Similar to *Montgomery*, there is no showing in this case that Mr. Leggett's and Ms. Kurtzhall's testimony unfairly influenced the jury verdict and, as in *Hardy*, "[t]he jury was free to disbelieve [the witnesses]; the ultimate issue of identification was left to the jury." 76 Wn. App. at 191. Accordingly,

even if the witnesses' statements were improper, Mr. Johnson has not established unfair prejudice resulted from the testimony. There was no error.

2. Ineffective assistance of counsel claim regarding the alleged hearsay.

Mr. Johnson also alleges ineffective assistance of counsel for failing to object to Mr. Leggett's and Ms. Kurtzhall's testimony.

Where a claim of ineffective assistance of counsel is predicated on defense counsel's failure to object, the defendant must also show that the objection would have likely been sustained. *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). Failure to establish either deficient performance or prejudice resulting from such deficiency is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

Here, the witnesses' testimony was not improper opinion testimony and does not constitute an egregious circumstance. As discussed above, the alleged error concerned statements of identity of the shooter. Even if objectionable, defense counsel had a legitimate tactical reason not to object to the testimony so as to not emphasize it to the jury. *See State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026 (2014) ("[I]t can be a legitimate trial tactic to withhold an objection to avoid emphasizing inadmissible evidence."); *see also*

State v. Kloepper, 179 Wn. App. 343, 354, 317 P.3d 1088, *review denied*, 180 Wn.2d 1017 (2014) (“The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective”).

Because defense counsel had a legitimate tactical reason for not objecting to the testimony, Mr. Johnson cannot demonstrate ineffective assistance on this ground.

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED TESTIMONY REGARDING THE DEFENDANT’S TENANCY STATUS AT THE COMPLEX AS IT PROVIDED A BASIS FOR MS. KURTZHALL’S FAMILIARITY WITH THE DEFENDANT AND THE BASIS FROM WHICH SHE COULD IDENTIFY THE DEFENDANT IN A SURVEILLANCE PHOTOGRAPH. FURTHERMORE, DEFENSE COUNSEL WAS NOT INEFFECTIVE WHEN HE DID NOT OBJECT TO THE TESTIMONY.

Mr. Johnson next asserts that the trial court erred when it overruled an objection to testimony regarding his tenancy status at the complex. Appellant Br. at 43-48. At the time of trial, Ms. Kurtzhall testified regarding her familiarity with Mr. Johnson, as he was an unauthorized guest and boyfriend of a tenant, Noel Beck, who lived at apartment 319, at the complex. RP 251. She explained that a person was “unauthorized” if he or she resided in an apartment for more than three days without applying to be

added to the lease. RP 251. If a person did not apply for approval, he or she had 14 days to stay in a particular apartment. RP 251.¹²

Ms. Kurtzhall asked Ms. Beck to comply with the terms of the lease so that Mr. Johnson could properly reside with her. RP 252. Ultimately, the paperwork and application were filed with the Spokane Housing Authority to add Mr. Johnson to the lease and it was denied. RP 252.

Defense counsel voiced one objection regarding a question pertaining to Mr. Johnson's status at the complex:

[DEPUTY PROSECUTOR]: At some point in time was it ever suggested to or told to either Ms. Beck or Ms. Johnson by you that Mr. Johnson was not permitted to be at the Cornerstone?

[WITNESS]: We had a --

[DEFENSE COUNSEL]: Objection, relevance.

THE COURT: Overruled.

[WITNESS]: We had addressed that issue a few times. I informed her that I was considering him an unauthorized guest and he would have to leave. He would leave for a few days and then he would come back. I would serve her with a ten-day notice to comply because she was violating the lease and then I asked her if he could just please fill out an application so that we could do this the correct way and he could reside with her.

RP 252.

¹² These particular conditions were required by the Spokane Housing Authority, who leased the property. RP 248, 251.

Standard of review.

An appellate court reviews a trial court's ruling on an objection for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008). A trial judge, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and therefore the prejudicial effect of a piece of evidence." *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007) (internal citations omitted).

1. Relevancy of Mr. Johnson's tenancy status at the complex.

ER 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible. *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999), *review denied*, 140 Wn.2d 1017 (2000).

ER 403 states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." In determining whether there is prejudice, the linchpin word is "unfair." "Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact

to reach one decision rather than another.” *State v. Perez-Valdez*, 172 Wn. 2d 808, 826, 265 P.3d 853 (2011).

Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial. *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984).

Under ER 403, the burden of showing prejudice is on the party seeking to exclude the evidence. *Carson*, 123 Wn.2d at 225. A presumption favors admissibility under ER 403. *Id* at 225. Because of the trial court’s considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. *State v. Gould*, 58 Wn. App. 175, 180, 791 P.2d 569 (1990).

Here, the evidence was relevant to establish how Ms. Kurtzhall came to know Mr. Johnson, the basis for her opportunity to observe Mr. Johnson, and the accuracy of her identification of him in the complex’s surveillance tape video footage after the events. Unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors. *Carson*, 123 Wn.2d at 223; *State v. Cameron*, 100 Wn.2d 520, 529, 674 P.2d 650 (1983). Mr. Johnson’s argument that

this testimony cast him in a negative light is without merit and is not supported by the record as discussed below.

2. Ineffective assistance of counsel.

Mr. Johnson additionally claims that his lawyer was ineffective by not objecting to the evidence on the basis it was “propensity” evidence under ER 404(b) and that he did not voice a more specific objection. Appellant Br. at 45-48.

Counsel is presumed to be effective, and Mr. Johnson must show an absence of legitimate strategic reasons to support his counsel’s challenged conduct. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Because Mr. Johnson rests his claim of ineffective assistance of counsel on defense counsel’s failure to object, he must show the trial court likely would have sustained an objection, *Fortun-Cebada*, 158 Wn. App. at 172, and that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Mr. Johnson has not provided *any* authority that a person’s status under a lease agreement can be considered a “prior bad act.” He asserts “that [since] he was denied permission to be added to the lease, the jury was likely to conclude that Johnson was a rule-breaker or scofflaw, but also someone with a criminal history that would preclude his being added to the lease.” Appellant Br. at 46. This argument is wholly unsupported by the record.

Efforts were made to add Mr. Johnson to Ms. Beck's lease, but in the end, he was denied. Indeed, Mr. Johnson was allowed to continue living at the apartment, pending his application to become a permanent resident. There was no evidence presented that he had been evicted, barred from the rental complex, or had any prior law enforcement contacts or convictions. The denial of his application could have been based upon a number of lawful reasons, including not meeting certain federal or state criteria, not having the financial means necessary for acceptance, the required references, and so on. Mr. Johnson has not provided any authority or a logical basis to conclude this activity was a prior bad act or that the jury would assume he had criminal history because of it. Moreover, other than conclusory statements, Mr. Johnson has not established that that the trial court would have granted an objection on this basis, or any other basis, and that the result of the trial would have been different had this evidence not been allowed.

Finally, under certain circumstances, the failure to object may be a reasonable strategy to avoid emphasizing improper or irrelevant testimony. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Having one objection overruled, defense counsel may have decided not to voice another objection to avoid placing undue influence on the testimony.

The defendant has not established ineffective assistance of counsel and there was no error.

IV. CONCLUSION

For the reasons stated herein, the State respectfully requests this Court affirm the judgment and sentence.

Dated this 18 day of August, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'L. Steinmetz', is written over a horizontal line.

Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER T. JOHNSON,

Appellant.

NO. 34710-9-III

CERTIFICATE OF
SERVICE


I certify under penalty of perjury under the laws of the State of Washington, that on August 18, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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8/18/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

August 18, 2017 - 10:07 AM

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